
IN THE MISSOURI SUPREME COURT

NO. 77067

STATE OF MISSOURI

Respondent,

v.

JOSEPH WHITFIELD

Appellant.

APPELLANT'S BRIEF IN SUPPORT OF MOTION
TO RECALL THE MANDATE

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JURISDICTIONAL STATEMENT

This brief is in support of a Motion to Recall the Mandate filed in a capital case in which this Court had jurisdiction over the original appeal pursuant to Article V, Section 3 of the Missouri Constitution, Mo. Rev. Stat. § 565.035 and Rule 30.18.

STATEMENT OF FACTS¹

Appellant, Joseph Whitfield, was sentenced to die by the trial court² after the jury at his capital trial was unable to reach a verdict as to punishment, deadlocking 11-1 in favor of life imprisonment. *State v. Whitfield*, 939 S.W. 2d 361, 365 (Mo. banc 1997).³ Mr. Whitfield appealed and filed a motion for post-conviction under former Rule 29.15.⁴ That motion included the following claim:

The imposition of the death penalty against movant in this case was in violation of RSMo. § 565.030 and of movant's right to a trial by jury because the movant was sentenced to death without the jury

¹The facts of the underlying case are set forth at length in this Court's opinion in *State v. Whitfield*, 939 S.W.2d 361 (Mo. banc 1997). This brief recites only the facts relating to Mr. Whitfield's Motion to Recall the Mandate.

²The Honorable Robert H. Dierker, Jr.

³This was a retrial, an earlier conviction having been reversed by this Court. *State v. Whitfield*, 837 S.W. 2d 503 (Mo. banc 1992).

⁴Mr. Whitfield's Rule 29.15 motion was filed February 17, 1995 (29.15 L.F. 267-333), before the effective date of the 1995 amendment to Rule 29.15. Therefore, Mr. Whitfield's direct appeal was consolidated with his appeal from the denial of the Rule 29.15 motion.

expressly having found, beyond a reasonable doubt, the existence of any aggravating circumstance as required by statute before the death penalty can be imposed.

(Amended Motion, ¶ 30, 29.15 L.F. 280.)

Astonishingly, although this claim was clearly and explicitly raised in the amended motion, the motion court inexplicably dismissed it as a claim challenging defects in the language of penalty phase jury instructions. (Memorandum, Order and Judgment at 22-23, 29.15 L.F. 28-29.) The claim was not briefed on appeal, although Mr. Whitfield did brief the related claim that trial counsel was ineffective for failing to ascertain the trial judge's views on the death penalty to guard against the possibility that the ultimate sentencing decision would be made by someone (other than the jurors) with an impermissible bias in favor of death. (Appellant's Brief 20-29).

This Court affirmed Mr. Whitfield's conviction and sentence (and the denial of post-conviction relief), *Whitfield*, 939 S.W.2d at 364, 373. Thereafter, Mr. Whitfield sought federal habeas corpus relief. The United States District Court granted the writ in part, giving Mr. Whitfield sentencing relief, but denied the writ as to the guilt phase of the proceeding. *Whitfield v. Bowersox*, No. 4:97-CV-1412 CAS (E.D. Mo. 2001). An appeal and cross appeal from that ruling are pending

before the United States Court of Appeals for the Eighth Circuit. *Whitfield v.*

Bowersox, Nos. 01-1537, 01-1538.

While Mr. Whitfield's federal habeas case was pending in the Eighth Circuit, the United States Supreme Court decided *Ring v. Arizona* ____ U.S. ____, 122 S. Ct. 2428 (2002), holding that any fact which increases a defendant's punishment from life imprisonment to death must be found by a jury beyond a reasonable doubt. Since the record in this case is bereft of these necessary jury findings, Mr. Whitfield filed his Motion to Recall the Mandate in this Court, asking this Court to recall its Mandate affirming his conviction and death sentence, and to remand this case to the trial court in light of *Ring*, with directions that he be resentenced to life imprisonment.

POINT RELIED ON

JOSEPH WHITFIELD'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, MADE APPLICABLE TO THIS PROCEEDING BY THE FOURTEENTH AMENDMENT, WAS VIOLATED WHEN HE WAS SENTENCED TO DEATH BY THE TRIAL COURT DESPITE THE FACT THAT THE JURY VOTED ELEVEN TO ONE FOR A LIFE SENTENCE, IN THAT THERE IS NO INDICATION IN THE RECORD THAT THE JURY UNANIMOUSLY FOUND (1) THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, (2) THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT WARRANTED THE IMPOSITION OF THE DEATH PENALTY, OR (3) THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT WAS NOT OUTWEIGHED BY EVIDENCE IN MITIGATION, SINCE EACH OF THESE FINDINGS IS A FACT NECESSARY TO INCREASE MR. WHITFIELD'S PUNISHMENT FROM LIFE IMPRISONMENT TO DEATH UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN *RING v. ARIZONA*.

ARGUMENT

I. The holding of *Ring v. Arizona*.

The central holding of *Ring* is simple, yet profound: “Because . . . aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ . . . the Sixth Amendment requires that they be found by a jury.” 122 S. Ct. at 2443 (internal citation omitted). As the Supreme Court went on to explain, “[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.” *Id.* *Ring* thus applied to capital sentencing the holdings of *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2002).

Ring is not simply a case about rules of criminal procedure. Rather, it addresses (and answers in the affirmative) the fundamental criminal law question of whether a fact which increases the maximum punishment applicable to a crime from life imprisonment to death actually creates a new and distinct crime that amounts to a greater offense than the one covered by the jury verdict in the guilt phase. Since,

as must be concluded from the *Ring* trilogy,⁵ the facts necessary to support a death sentence represent elements of a greater offense than the first-degree murder of which the jury found Mr. Whitfield guilty, Mr. Whitfield was sentenced to death in violation of **the fact-finding required for death eligibility under Missouri law.**

Missouri’s capital sentencing procedures, applicable to Mr. Whitfield, are found at Mo. Rev. Stat. § 565.030.4. That statute outlines a four-step process: (1) a statutory aggravating circumstance must be found beyond a reasonable doubt; (2) the evidence in aggravation of punishment, including but not limited to, evidence supporting the statutory aggravating circumstances, must be found to warrant imposing a death sentence; (3) there must not be evidence in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment; and (4) a decision, under all of the circumstances, whether to assess and declare the punishment at death, or, rather, at life imprisonment without eligibility for parole. Clearly, the first three of these factors are squarely governed by the rule of *Ring*. These separate and distinct factual findings are each “elements” of “death eligible first degree murder.” Therefore, a defendant has a Sixth Amendment right to a jury determination of each of those elements.

⁵ *Ring, Apprendi, and Jones.*

At Mr. Whitfield's trial, the jury did not explicitly find the existence of *any* aggravating factors, did not find that the evidence in aggravation warranted imposing the death sentence, and did not find that the evidence in mitigation of punishment was insufficient to outweigh evidence in aggravation of punishment. Therefore, the sentence of death imposed upon Mr. Whitfield by the state court was imposed in violation of his Sixth Amendment right to trial by a jury.

III. Mr. Whitfield's jury did not find the required elements.

It is undisputed that Mr. Whitfield's jury returned a verdict form stating that they were unable to agree on punishment (L.F. 207), having voted 11 - 1 in favor of life imprisonment. *Whitfield*, 939 S.W. 2d at 365. From the verdict form, there is no way to determine at which step of the four-step penalty deliberation process that impasse occurred.

Mr. Whitfield acknowledges this Court's opinion in *State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997) and the cases upon which *Smith* relies for the proposition that a jury may be presumed to have followed the instructions. However, insofar as *Smith* and its predecessors hold that the jury's failure to agree on the punishment in a capital case allows the court to presume that the jury unanimously found the existence of some statutory aggravating circumstance beyond a reasonable doubt, those cases were wrongly decided because they were

not informed by the central holding of *Ring* that facts necessary to increase punishment from life imprisonment to death are elements of a greater offense. Of course, necessary elements of a criminal offense cannot be *presumed*, but must be proved beyond a reasonable doubt. *See Ring*, 122 S.Ct. at 2444 (Scalia, J., concurring). “The use of presumptions and inferences to prove an element of the crime is indeed treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense. It thus implicates the integrity of the judicial system.” *Barnes v. United States*, 412 U.S. 837, 850 (1973) (Douglas, J., dissenting).

This Court, of course, has recognized that elements of crimes must be found by the jury, and cannot be presumed from any given factual situation. In *State v. King*, 577 S.W.2d 621 (Mo. banc 1979), this Court dealt with the requirement that a lesser degree of murder be submitted to the jury even though, according to the Court of Appeals, Eastern District, ““The evidence warranted only one conclusion - the victim was executed in cold blood deliberately, willfully, with premeditation and malice aforethought.”” *Id.* at 622. This Court held, “The mental elements constituting the various grades or degrees of homicide are for the jury to determine, and it is only the jury that has the authority to decide upon their presence or absence in any given case.” *Id.* at 623. Of course, as *Ring* teaches, this also holds

true for facts required to increase the punishment from life imprisonment to death; they must be explicitly found by the jury and cannot be implied by a court from an ambiguous or silent record.

In *Tot v. United States*, 319 U.S. 463 (1943), the United States Supreme Court struck down as violative of due process a statute which created a presumption of the interstate or foreign commerce element of the federal offense of possession of a firearm by a person who has been convicted of a crime of violence. “Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.” *Id.* at 467-8.

The presumption that, because the jury returned a verdict form stating that it was unable to agree on punishment, it must necessarily have unanimously agreed on some unidentified, unstated statutory aggravating factor is likewise at odds with common experience. Consider the possibility that one or more jurors are adamantly convinced that an aggravating circumstance or circumstances exist, that those circumstances warrant a death sentence, that those factors are not outweighed by evidence in mitigation and that death is the only appropriate sentence in the particular case. Can such jurors reasonably be expected to concur

in a verdict of life imprisonment, whatever the instructions may say, if they know they have the power to hang the jury and leave open the possibility of a judge-imposed death sentence?⁶

Moreover, *Smith* and its predecessors deal only with the first step of the four step penalty phase deliberation process -- whether a statutory aggravating circumstance exists. Arguably, the rationale of *Smith* would apply to the second step -- whether the aggravating circumstances warrant a death sentence. However, that rationale cannot be applied to the third step -- whether the aggravating circumstances are not outweighed by evidence in mitigation of punishment, since

⁶In *State v. Thompson*, No. SC83661 (Mo. Aug. 27, 2002), this Court saw the very unusual instance where, apparently, the jury did scrupulously follow the instructions mandating a life verdict if they were unable to agree on a statutory aggravating circumstance or that death was warranted. However, the trial court polled the jury, revealing the lack of unanimity, with an ambiguous question which was not directed to the point at which unanimity was lacking, and refused to accept the verdict. Slip Op. 4-5. The trial court's action reflects the common experience that a non-unanimous penalty phase jury can be expected to return the verdict form stating that they are unable to agree, notwithstanding which step of the process results in the impasse.

the jury was never instructed that it had to return a life sentence if it could not unanimously agree on this point. Clearly, however, this third factual finding is an element of death-eligible first degree murder under *Ring*. Equally clearly, a unanimous jury finding on this element is necessary to make Mr. Whitfield eligible for the death penalty. *See Richardson v. United States*, 526 U.S. 813, 818 (1999) (“...[I]f the statute makes each ‘violation’ a separate element, then the jury must agree unanimously about which three crimes the defendant committed.”) There was no unanimous jury finding of any kind in Mr. Whitfield’s penalty trial, and there was certainly no finding from which a unanimous jury conclusion that evidence in aggravation was not outweighed by evidence in mitigation can be presumed.

Since Mr. Whitfield was sentenced to death without any unanimous jury finding of (1) a statutory aggravating circumstance, (2) that the evidence in aggravation warranted the death penalty, or (3) that the evidence in aggravation was not outweighed by evidence in mitigation, Mr. Whitfield’s Sixth Amendment right to trial by jury and Fifth and Fourteenth Amendment right to due process were violated. This Court should recall its Mandate, reverse the judgment and sentence, and remand the case to the trial court with directions to sentence Mr. Whitfield to life imprisonment without eligibility for parole.

IV. A Motion to Recall the Mandate is the appropriate remedy.

A motion to recall the mandate is properly made when a defendant seeks relief from defects in appellate court proceedings. *See State v. Palmer*, 976 S.W.2d 29, 30 (Mo. Ct. App. E.D. 1998) (citing *Hemphill v. State*, 566 S.W.2d 200, 208 (Mo. banc 1978); *see also State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc 1999) (“A motion to recall the mandate is proper when a defendant seeks relief from defects in the court of appeals proceedings”). Missouri courts properly recognize that an appellate court’s mandate “may be recalled in order *to remedy a deprivation of the federal constitutional rights of a criminal defendant.*” *State v. Thompson*, 659 S.W.2d 766, 769 (Mo. banc 1983) (emphasis added). For example, “a Motion to Recall the Mandate may be employed. . .when the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused.” *Id.*; *see also State v. Teter*, 747 S.W.2d 307, 308 (Mo. Ct. App. W.D. 1989).

A motion to recall the mandate is also the proper means to raise a claim of ineffective assistance of appellate counsel in cases where the defendant was sentenced prior to January 1, 1996. *Edwards*, 983 S.W.2d at 522 n.2. Mr. Whitfield was sentenced on June 23, 1994. Trial Tr. at 2226. Although Mr. Whitfield asserts in the first instance that he is entitled to a recall of the mandate to remedy a defect in the appellate proceedings – i.e., the opinion of this Court was

based upon an erroneous view of the Constitution – he asserts in the alternative that his appellate counsel rendered ineffective assistance by failing to assert that the trial judge’s sentence of death, imposed in the absence of necessary jury findings, violated his rights to due process and a jury trial under the Fifth, Sixth, and Fourteenth Amendments. *See Edwards*, 983 S.W.2d at 522.

V. Joseph Whitfield is entitled to a life sentence.

When courts grant penalty phase relief in a capital case, they sometimes do so conditionally, giving the State an opportunity to conduct a new sentencing trial. That form of relief would not be appropriate under the instant claim, since, as Mr. Whitfield has shown, the jury did not render any findings that would make him eligible for the death penalty. Certainly, Missouri has no statutory procedure which would authorize the impanelment of a second jury if the first jury is unable to agree on the existence of “elements” of death eligible first degree murder.

The clear effect of *Ring* is to hold that the portion of the Missouri capital sentencing scheme which permits the court to assess a sentence of death when the jury deadlocks on any of the first three penalty phase factual findings is unconstitutional. The Missouri statutory scheme is explicit and unambiguous about the relief to be granted when a death sentence is held to be unconstitutional. Mo. Rev. Stat. § 565.040.2 provides, in pertinent part:

In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the Governor...

This statute obviously means exactly what it says. Equally obviously, it applies to Mr. Whitfield's death sentence.

Mr. Whitfield is entitled to this relief.

CONCLUSION

Wherefore, Appellant, Joseph Whitfield, respectfully moves this Honorable Court to withdraw its mandate previously issued herein, to reverse the judgment and sentence of the trial court, and to remand this case to the trial court with directions that he be sentenced to imprisonment for life without eligibility for parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Brief in Support of Motion to Recall the Mandate in the above captioned matter was prepared using Word Perfect 9.0 printed in 14 point Times New Roman proportionally spaced type font. I further certify that, in conformity with the requirements of Rule 84.06, the above brief contained 3,434 words. I further certify that the computer diskette provided herewith contained four files:

- a. brief cvr. (brief cover)
- b. brief toc (table of contents)
- c. brief toa (table of authorities)
- d. brief.fnl (body of brief)

I further certify that the computer diskette was new out of the box and that, after the brief was copied thereon, the diskette was scanned for viruses using Norton AntiVirus 2000, and no virus was detected.

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing and a copy of the diskette were sent by U.S. Mail, postage prepaid, this ____ day of September, 2002, to:

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